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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 945

LAWRENCE P. HICKEY, et. al.,
Petitioners,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

ILLINOIS CENTRAL RAILROAD COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This was a real property action brought in the Circuit Court of Cook County. The plaintiffs were the State of Illinois, the City of Chicago and petitioners who sued as taxpayers on behalf of the State and City. The suit challenged the Illinois Central's title to certain lands located adjacent to Chicago's original lakefront. Plaintiffs sought a judgment that the State owned the fee to the lands in controversy and the air rights[1] over those lands and that respondent merely held an easement for railroad purposes.

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1. Under Illinois law (Ill. Rev. Stat. 1965, Ch. 114, § 174a) railroads may sell, lease or themselves develop air rights over land owned by them.

After extensive argument the trial court entered its final judgment decreeing that "defendant Illinois Central Railroad Company is the owner in fee simple of all the lands claimed in this cause by the State of Illinois and the City of Chicago or on their behalf." (Pet. App., p. 37) On appeal to the Supreme Court of Illinois, that Court entered its final judgment that "the judgment of the Circuit Court of Cook County aforesaid be affirmed in all things and stands in full force and effect notwithstanding the subject matter and things therein assigned for error." (Pet. App., p. 30)

In a unanimous opinion[2] the Illinois Supreme Court held that as a matter of state law the State, the City of Chicago and the taxpayer petitioners here were estopped to challenge the respondent's fee simple title.

This is the second time petitioners have sought to bring their alleged claim against the Illinois Central into this Court (cf. *Hickey, et. al.* v. *Illinois Central Railroad,* 278 F.2d 529 (7th Cir. 1960), *cert. denied,* 364 U.S. 918 (1960)). It is also the second time this term that the Court has been asked to hold that a so-called federal trust, of purely judicial origin, disables the State of Illinois from making limited conveyances of its submerged lands to private users (cf. *Droste* v. *Kerner,* et al., No. 671, Oct. Term 1966, *appeal dismissed,* .... U.S. .... (1967)).

Only the taxpayer petitioners seek certiorari. The State and the City have publicly announced that in their view no federal question is present and that no useful purpose can be served by postponing the finality of the Illinois Supreme

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2. Hickey, et. al. v. Illinois Central Railroad Company, 35 Ill. 2d 427, 220 N.E. 2d 415 (1966).

Court's judgment.[3] Since petitioners pretend to be representing the State and enforcing its claims, this decision by the State should be dispositive of every argument they now present.

QUESTION PRESENTED

After reviewing the history of the lands in controversy, the circumstances claimed to vitiate the Illinois Central's title, and a "remarkably lengthy series of official acts, statements and declarations by various officials, bodies or representatives of the State, indicating that the now disputed title to these lands was then vested in the Illinois Central,"[4] the court below observed that if that prior conduct had barred the State from asserting a claim no other question in the case need be reached. "In the context of the extraordinary circumstances here prevailing"[5] the court then concluded that the State, the City, and the petitioners on their behalf were estopped to challenge respondent's fee simple title.

Since this conclusion was based entirely on state law, the only question presented is:

> Whether a federal question is raised by a state supreme court ruling that as a matter of state law the state may be estopped from claiming title to land within its boundaries.

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3. Shortly after the Illinois Supreme Court denied a Petition for Rehearing (Pet. App., p. 28), the Attorney General of the State of Illinois and the Corporation Counsel of the City of Chicago issued an official public statement to this effect. Respondent respectfully asks that the Court take judicial notice of this statement, a true copy of which is attached as an Appendix to this brief.

4. Hickey, et. al. v. Illinois Central Railroad Company, 35 Ill. 2d 427, 439, 220 N.E. 2d 415, 421 (1966).

5. *Id.* 35 Ill. 2d at 449, 220 N.E. 2d at 427.

Petitioners now belatedly assert that this Court's opinion in the Lakefront Case, *Illinois Central R. R. v. Illinois,* 146 U.S. 387 (1892), created a "federal trust" of all Illinois lands submerged or formerly submerged by Lake Michigan. This argument, apparently borrowed from the jurisdictional statement filed with this Court in *Droste* v. *Kerner,* No. 671, Oct. Term, *appeal dismissed,* .... *U.S.* .... (1967), was neither presented to nor decided by the court below.

STATEMENT

Petitioners, four Chicago lawyers, commenced this litigation in the state courts in 1960 on behalf of the State of Illinois and City of Chicago, following dismissal of an earlier suit in the district court for lack of federal jurisdiction.[6] Subsequently, the City of Chicago intervened as a plaintiff, and still later the State of Illinois intervened and filed its own complaint after a similar suit brought by the State in the federal district court in 1962 had also been dismissed for want of jurisdiction.[7]

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6. Hickey v. Illinois Central Railroad, 278 F.2d 529 (7th Cir. 1960), cert. denied, 364 U.S. 918 (1960).

7. Illinois v. Illinois Central Railroad Company, No. 62 C 1749, Northern District of Illinois, motion to dismiss for lack of federal jurisdiction granted November 15, 1963, (unreported). Thus, two federal courts have now decided that petitioners' attack on the Illinois Central's title involves no federal question, and this Court has already denied certiorari once. It follows that elementary principles of *res judicata* alone provide a conclusive answer to the present petition. The federal district court suits involved the same alleged cause of action as the case at bar. The same title to the same land was attacked. The same claims that the Illinois Central had only an easement for railroad purposes were made. In their federal suit petitioners contended that fee title to the land was in the State of Illinois, the City of Chicago or other parties, on the theory that one or more of them owned reversionary interests. Petitioners then had the opportunity to raise each claimed federal question they now

The Complaint and Intervening Complaint asserted that lands reclaimed from Lake Michigan by the Illinois Central belonged to the State of Illinois and the City of Chicago and that the Railroad had merely an easement over such lands for railroad purposes.

In 1883 the State of Illinois had brought an action against the Illinois Central in the United States Circuit Court for the Northern District of Illinois, claiming title to land reclaimed from Lake Michigan and to an area still submerged. In that case it was ultimately adjudged and decreed, among other things, "that the Illinois Central Railroad Company is the owner in fee of all the wharves, piers and other structures erected by it ... including the station grounds." (R. 3, pp. 425-6). Those wharves, piers, structures and station grounds were the reclaimed land to which the State sought title. It now constitutes a major portion of the land in controversy.

In actions brought in 1912, 1913 and 1930 in the Circuit Court of Cook County, Illinois, by the South Park Commissioners, an agency of the State of Illinois, statutory boundary line agreements between the Park Commissioners and the Illinois Central were approved with respect to all of the property in question. (R. 3, pp. 393-94, 399-400, 523). The statutes involved provided for such agreements and

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assert. The Court of Appeals for the Seventh Circuit nevertheless held:

> "We conclude that, insofar as plaintiffs sue on behalf of the people of the State and City, the case is not within the judisdiction of the federal courts." 278 F.2d at 532.

This Court denied certiorari, and the Seventh Circuit's ruling thereupon became a final adjudication that the claims made in the courts below present no federal questions. There is "no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation." Stoll v. Gottlieb, 305 U.S. 165, 172 (1938).

Circuit Court approval thereof (Laws of Illinois, 1907, p. 433; Laws of Illinois, 1912, p. 51) for the purpose of eliminating riparian rights along the Lake Michigan shore so that public parks and boulevards could be built on land reclaimed from the lakebed (R. 3, pp. 392-93, 395-96, 523). To compensate the shoreland owners for the loss of their riparian rights (R. 3, pp. 199, 346) the statutes provided that upon Circuit Court approval of a boundary line agreement:

> "the owners of said shore lands are hereby granted by the State of Illinois the title to the . . . submerged, . . . lands, . . . up to the line so established, free from any adverse claim in any way arising out of any question as to where the shoreline was at any time in the past or as to the title to any existing accretions." (Laws of Illinois, 1907, p. 435; Laws of Illinois, 1912, p. 54; R. 3, pp. 393, 396, 523).[8]

As the court below observed, it was alleged in considerable detail by the Illinois Central, and not denied, that the State of Illinois and the City of Chicago had by a series of official acts repeatedly and over a long period of time acknowledged the fee title of the Illinois Central to the lands in dispute (R. 3, pp. 401-17, 525). This official conduct commenced after the first Lakefront decision in 1892 and continued during the boundary line proceedings and up to 1962.

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8. As the court below noted (Pet. App. 22; 35 Ill. 2d at 446, 220 N.E. 2d at 425), some fifty other boundary line proceedings have been concluded under this statute settling the boundaries and titles to many separate parcels of former shoreland. The lakebed east of those lands is now filled in and occupied by Chicago's extensive lakefront park system, made possible through the surrender of riparian rights pursuant to such boundary line proceedings.

ARGUMENT

I.

The Illinois Supreme Court Holding That The State Was Estopped To Claim The Title To Illinois Land Does Not Present a Federal Question.

Asserting that the courts below defied the decree of a federal court, the petitioners claim that federal questions are raised under the supremacy clause and Article III of the Constitution. But the lower courts did not do any such thing. It was recognized (Pet. App., p. 8; 35 Ill. 2d at 433; 220 N.E. 2d at 418) that the Lakefront decrees were *res judicata*. The trial court rejected petitioners' interpretation of these decrees, however, and the Illinois Supreme Court, while not disagreeing with the trial court, held that it was unnecessary to resolve the dispute over how the decrees should be interpreted.

The Illinois Supreme Court said:

> "If we assume to be correct the conclusions drawn by the plaintiffs as to deficiencies in the methods by which the State was divested of its original title to the offshore lake bed, (and we do not mean to imply that they are,) is the State by its conduct prior hereto now barred from asserting its claim? If so, there is no reason for discussion of other issues." (Pet. App., p. 23; 35 Ill. 2d at 447; 220 N.E. 2d at 425).

That court then concluded that as a matter of Illinois law:

> "In the context of the extraordinary circumstances here prevailing we believe basic concepts of right and justice preclude the State from now asserting any claim to the lands involved in these proceedings. For a period of more than fifty years, all governmental bodies, including numerous Attorneys General and various other agencies of the State of Illinois, together with representatives of the city of Chicago, have con-

sistently disclaimed any interest in the lands, title to which is now asserted, and have continuously acted as if they were owned in fee by the Illinois Central. Only after this cause was pending in this court on the first appeal herein did the Attorney General seriously maintain the contrary." (Pet. App., p. 26; 35 Ill. 2d at 449; 220 N.E. 2d at 427.)

Thus, the case "in effect was disposed of before the federal question said to be involved was reached . . . A decision of that question then became unnecessary." *Fox Film Corp.* v. *Muller,* 296 U.S. 207, 211 (1935). Events subsequent to the Lakefront case have rendered petitioners' dubious interpretation of its result irrelevant. "[T]his Court does not sit to decide arguments after events have put them to rest." *Doremus* v. *Board of Education,* 342 U.S. 429, 433 (1952).

Clearly, the Illinois Supreme Court's state law grounds were broad enough to support its decision. As that court observed, there was "a remarkably lengthy series of official acts, statements and declarations . . . indicating that the now disputed title to the lands was then vested in the Illinois Central" (Pet. App. 15; 35 Ill. 2d at 439, 220 N.E. 2d at 421). As in *Donohue* v. *Vosper,* 243 U.S. 59, 66 (1917), the litigation below "was essentially a local question, involving an appreciation of the evidence as to the conduct of the parties, and we cannot review it." It is equally clear here that the Illinois Supreme Court must be the final authority on mere issues of title to real estate in Illinois.

Petitioners' only response is two inapposite quotations from *U.S.* v. *California,* 332 U.S. 19 (1947). But *U.S.* v. *California* decided that actions of federal officials had not estopped the federal government, as against a state, from claiming title to land submerged beneath the ocean, a controversy within the original jurisdiction of this Court.

Resolution of that purely federal issue was never intended to create a doctrine binding on state courts dealing with their own states and lands.

On the contrary, decisions of this Court have consistently held that in state court litigation doctrines of estoppel, whether applied against a state or a private person, present questions of state law alone. In *Michigan* v. *Flint & Pere Marquette R.R. Co.*, 152 U.S. 363, 368 (1894), the Court granted a motion to dismiss the state's writ of error saying:

> "The Supreme Court of Michigan held . . . that the claim of the State had no foundation in equity, justice, or good conscience; that it had become stale; and that the State was estopped to assert title in itself to the lands in question. As its judgment thus rested upon the decision of a question which was not Federal, this court has no jurisdiction to review it, and the writ of error must be dismissed."

Even when one of the parties invokes a federal judgment, the question whether he is estopped to rely on it is nonetheless "not a Federal question. Whether it was sound or not, it is not for . . . [this Court] to inquire. It was broad enough to support the judgment without reference to any Federal question." *Leonard* v. *Vicksburg &c. R. R. Co.*, 198 U.S. 416, 423 (1905). Accord, *Wood* v. *Chesborough*, 228 U.S. 672 (1913); *Hale* v. *Lewis*, 181 U.S. 473 (1901). Consequently, the Illinois Supreme Court's decision neither reaches nor raises a federal question.

II.

Petitioners' So-Called "Federal Trust" Is A Creature of State Not Federal Law.

In an effort to sidestep the decision below, petitioners assert that the lands in controversy are held in the grip of a trust which they label federal. But repetitious character-

ization cannot create a federal question. Their asserted but hitherto unrecognized federal interest in state-owned submerged lands can not be supported. It was not even presented to the courts below.[9]

While suggesting that their "trust" had its source in the Congressional resolution admitting Illinois to the Union and prescribing its boundaries,[10] petitioners principally argue that the so-called "federal trust" was of judicial origin having its basis in *Illinois Central R.R.* v. *Illinois*, 146 U.S. 387 (1892).

Contrary to petitioners' reptitious assertions, however, the Lakefront Case clearly treated the public trust doctrine as a matter of state law. The case came to the federal courts

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9. Not a hint of any so-called "federal trust" argument appeared in this case before the petition for certiorari was filed. Actually, in the courts below petitioners took the position that Illinois not federal law controlled titles to submerged land. Paragraph 18 of their complaint asserted that in Illinois Central Railroad Company v. City of Chicago, 176 U.S. 646 (1900), "the Supreme Court of the United States reaffirmed its prior decision in 146 U.S. 387, referred to above in paragraph 17 hereof, and declared the local law of Illinois, which vests title to all reclaimed lands in the State of Illinois, to be conclusive on the question of the rights of the parties with respect to the ownership of lands reclaimed and filled in from the waters of the bed of Lake Michigan." (R. 3, p. 193) In paragraph 19 of the complaint they asserted this determination was *res judicata* "upon the foregoing issues," (R. 3, p. 194) and in paragraph 20 asserted that only the Illinois Legislature could convey title to reclaimed lands (R. 3, p. 195). Thus, as this Court has said many times before: "This question was not raised below. It emerged after the jurisdictional statement was filed here . . . Since the . . . [court below] did not pass on the question, we may not do so." State Farm Insurance Co. v. Duel, 324 U.S. 154, 160 (1945).

10. The most cursory reading of this resolution (Pet. App. 1-2) shows that, contrary to the assertion on page 18 of the petition, it granted no lands whatsoever to Illinois, let alone all "the federal lands within such boundaries," and nowhere declares any trust.

solely because of a claim that the State had impaired the obligation of a contract by repealing a grant to the Illinois Central of Chicago's entire inner and outer harbor and the adjacent submerged land for one mile out into the lake. The courts of Illinois had not at that time ruled on any of the issues involved.

This Court's opinion on the first appeal (146 U.S. 387) attributed the public trust doctrine it discussed to common-law, not federal constitutional or statutory sources. The opinion announced that:

> "the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea." (146 U.S. at 437)

and elaborated:

> "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters. . . . It is . . . grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor." (146 U.S. at 452-53)

The Court therefore held that the grant to the Illinois Central was not irrepealable and the Illinois Legislature had not thereby surrendered its "sovereignty and dominion . . . or its ownership" of the "submerged lands in Lake Michigan." Consequently, insofar as the grant affected the submerged lands in and adjacent to the harbor its repeal

did not violate the contract clause of the Federal Constitution. (146 U.S. at 459-60) But this was far from saying that states hold title to their submerged lands subject to a trust forever binding on reclaimed land as a matter of federal law.

On the contrary, the Lakefront case did not hold the grant to the Illinois Central repealable as to any of the then filled lakebed. Based on this grant and the law of riparian rights, the decrees approved and the opinion affirmed the Illinois Central's title to and reclamation of "a crucial portion" (Pet. 6) of the lands involved in this case. In addition, title to the balance of the filled land (Grant Park) was held to be in the City of Chicago by virtue of its riparian right as owner of the adjacent shore.

Moreover, this Court's opinion expressly and repeatedly acknowledged the state's power to make limited dispositions of submerged land such as Illinois has done on Chicago's lakefront. The opinion stated:

> "It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled." (146 U.S. at 453)

This distinction was reiterated three times in the language petitioners chose to quote at page 16 of the petition, although unrecognized in their argument and deprived of the benefit of typographic emphasis given to other passages in the quotation.

Nor do the decrees in the Lakefront Case, on which petitioners inaccurately rely (e.g., Pet. 3, 4, and 9), in any way suggest the creation of a trust, federal or otherwise. The decrees, in fact, find a "trust" only in the case of the City

of Chicago's title to what is now Grant Park, an area not involved in the case at bar.

Although overlooked in the petition, decisions of this Court both before and after the Lakefront case confirm that petitioners' "federal trust" is an innovation without support in any body of federal law. Public and private titles and rights in submerged lands have always been questions upon which "the provisions of the constitution and statutes of the State and the decisions of its highest court are accepted by . . . [this court] as conclusive." *Port of Seattle* v. *Oregon & Washington Railroad,* 255 U.S. 56, 63 (1921).

In fact, between the first and the second Lakefront appeals this court confirmed the state's authority over her own submerged lands in litigation brought by the City of Chicago in a state court to restrain the Illinois Central Railroad from filling in a certain part of the bed of Lake Michigan. In its opinion the Court observed that title to submerged land was controlled by "the law of the State of Illinois, as laid down by the Supreme Court, not only in the case under consideration, but in the prior case of *People* v. *Kirk,* 162 Illinois, 138 [45 N.E. 830 (1896)]." The same opinion in the same paragraph announced that the public trust doctrine, which petitioners now seek to project into a federal constitutional limitation, "is a question of local law with regard to which the decisions of the state courts are conclusive." *Illinois Central Railroad* v. *Chicago,* 176 U.S. 646, 659 (1900). Accord, *Norton* v. *Whiteside,* 239 U.S. 144 (1915); *Whitaker* v. *McBride,* 197 U.S. 510 (1905); *Shively* v. *Bowlby,* 152 U.S. 1, (1894); *Hardin* v. *Jordan,* 140 U.S. 371 (1891); *Packer* v. *Bird,* 137 U.S. 661 (1891).

The decision below thus poses no federal question.

CONCLUSION

The only one of petitioners' supposed federal questions that was presented to the court below, construction of the Lakefront decrees, has plainly been put to rest by the adequate state ground for the Illinois Supreme Court decision. Petitioners have wholly failed to raise any other federal question. In any event, petitioners seek to review issues so plainly local in their importance and application as to be insubstantial. Accordingly, certiorari should be denied.

Respectfully submitted

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